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In The Supreme Court of the United States

JEFFREY A. BEARD, Commissioner, Pennsylvania Department of Corrections; JAMES PRICE, Superintendent of State Correctional Institution at Greene; RAYMOND J. COLLERAN, Superintendent of State Correctional Institution at Waymart; COMMONWEALTH OF PENNSYLVANIA,

Petitioners,

v.

GEORGE E. BANKS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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QUESTIONS PRESENTED

1. Does this Court's decision in *Mills v. Maryland*, 486 U.S. 367 (1988), constitute a new rule of law that may not be applied retroactively to cases that are already final?

2. Where the state supreme court has held that a jury instruction does not violate *Mills*, and the federal court of appeals has previously agreed with that rationale, is the state court's holding "contrary to or an unreasonable application of" clearly established federal law, within the meaning of 28 U.S.C. § 2254(d)(1), merely because the Court of Appeals has now changed course from its original *Mills* analysis?

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OPINIONS BELOW

Respondent George Banks was convicted of multiple murders in 1983, and these judgments became final at the conclusion of his direct appeal in 1987, before this Court decided *Mills*. Banks subsequently raised a *Mills* issue in his first petition for state collateral review; the Supreme Court of Pennsylvania rejected this claim in 1995. *Commonwealth v. Banks*, 656 A.2d 467 (Pa. 1995), reprinted at Joint App. 119-38.[1] This Court denied *certiorari* later that same year. *Banks v. Pennsylvania*, 516 U.S. 835 (1995).

A federal district court denied habeas corpus relief. In 2001, the United States Court of Appeals for the Third Circuit granted relief on the *Mills* issue. *Banks v. Horn*, 271 F.3d 527 (3d Cir. 2001), reprinted at Pet. App. 72-120. This Court unanimously reversed and remanded in a *per curiam* opinion, directing the Court of Appeals to consider the retroactivity question. *Horn v. Banks*, 536 U.S. 266 (2002), reprinted at Pet. App. 61-68. On remand, the same Third Circuit panel again granted relief. *Banks v. Horn*, 316 F.3d 228 (3d Cir. 2003), reprinted at Pet. App. 1-57. The court held that *Mills* did not constitute a new rule within the meaning of *Teague v. Lane*, 489 U.S. 288 (1989), and therefore may be applied to older cases like this one. Pet. App. 5-38. Having disposed of the retroactivity question, the panel reinstated its decision on the merits from 2001. Pet. App. 38.

[1] Citations to "Joint App." refer to the Joint Appendix filed with this brief. Citations to "Pet. App." refer to the Appendix to the Petition for Writ of Certiorari.

JURISDICTION

This is a federal habeas corpus proceeding brought by a state capital defendant pursuant to 28 U.S.C. § 2254. Petitioner, the Commonwealth of Pennsylvania, seeks review of the order of the United States Court of Appeals for the Third Circuit dated January 14, 2003, reversing the order of the district court, and granting the writ as to sentencing. The Petition for Writ of Certiorari was filed on April 14, 2003, and was granted by this Court on September 30, 2003. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment to the United States Constitution, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

This case also implicates 28 U.S.C. § 2254(d), which provides, in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; . . .

STATEMENT OF THE CASE

Respondent George Banks murdered thirteen people with an assault rifle. Seven of the victims were infants and children, including five of his own. Banks also shot a fourteenth person, who survived to testify at trial – along with two young boys who saw Banks shoot their mother to death.

Banks lived in Wilkes-Barre, Pennsylvania. In 1982 he was 40, working as a prison guard in a state correctional institution. Over the preceding six years, Banks had acquired four different paramours, with whom he had fathered five children. The women ranged in age from 17 to 27 when Banks became involved with them. At various times all these woman and children lived with Banks. N.T. vol. I, pp. 12-14; vol. III, pp. 1015-16; vol. IV, pp. 1321-22.[2]

By the summer of 1982, however, Banks' "family" was falling apart.[3] In July, Sharon Mazzillo, mother of Banks' son Kismayu, moved with the child to her mother's residence. A custody battle ensued. Banks commented to friends that he would kill Sharon if he did not get his son back, and would kill her mother too, because she had put Sharon up to it. In early September, Regina Clemens,

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[2] "N.T." refers to the notes of testimony from the trial, comprising six separate volumes but continuously paginated.

[3] Banks had a previous family consisting of his legal wife and their two daughters. The wife and children left the area after Banks began his new relationships. N.T. vol. III, pp. 1014-15.

mother of Banks' daughter Montanzima, also moved out, to a domestic violence shelter, and made plans to relocate to another state. N.T. vol. I, pp. 141-42; vol. III, p. 1161, 1186-88; vol. V, pp. 1789-90. And several days before the murders, Susan Yuhas, mother of Banks' children Bowende and Mauritania, was seen running from the house, with Banks after her. He yelled that she was leaving just like her sister (Susan and Regina were siblings). After he punched her in the head, she returned to the house with him. N.T. vol. III, pp. 901-03.

Economic pressures were also mounting despite Banks' prison job. Regina received a monthly $1200 Social Security check that would no longer be available to Banks if she moved away. Susan's income was also lost to him when she quit her job in early September. Banks put in for a transfer to a different prison, citing financial grounds. He also applied for a HUD loan. He voiced suspicions that his paramours were stealing money from him, and that they were unfaithful. N.T. vol. II, pp. 691, 812-14; vol. III, pp. 1215-16, 1273, 1326.

On the night of September 24, three of Banks' paramours were attending a party at a friend's house. Banks called the house to speak with one of them, Dorothy Lyons, the one woman who apparently had not announced an intention to leave him. Banks instructed Dorothy to retrieve his gun from the friend's house, where he had been keeping it. Dorothy, upset and crying, did as instructed, and the three women left the party for Banks' residence. This was the last point at which they, or their children, were seen alive.

The gun was an AR-15 assault weapon, a semi-automatic civilian version of the military's M-16 rifle.[4] Shortly before 2:00 AM, a series of gunshots were heard from Banks' house. He emerged from the house carrying the gun and ran into a group of four people standing on the street. One of them remarked, "hey, I know you." Banks replied, "you're not going to live to tell anybody about this." He leveled the gun in one hand and shot the man in the chest. Then he shot the next man in the chest, while the two remaining members of the group dove to the ground. N.T. vol. I, pp. 175-80, 194-97, 221-24.

Banks walked on down the street. He shortly came to a parking lot where two men were conversing from their cars. Banks pointed his rifle at one of the men and told him to move over or get his head blown off. Banks told the man that he had just killed his children, and it would be wise not to give him any trouble. He then drove away with the man still in the car, but soon released him. N.T. vol. I, pp. 275-78, 290-94.

Banks drove several miles to the trailer home where his fourth paramour, Sharon, had moved in with her mother. Also staying at the trailer that night were Sharon's and Banks' son Kismayu, Sharon's nephew Scott, and the two young sons of Sharon's mother. When Banks arrived he began pounding on the door, and broke it in. He told Sharon, with whom he had had the custody fight, that she should not have come between him and the child, and

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[4] Banks had attempted to procure the parts necessary to render the weapon fully automatic, but did not complete the required forms, perhaps because of a prior felony conviction for a shooting during a robbery. N.T. vol. IV, pp. 1379-81; vol. V, p. 1862.

that now she could watch her son die. Banks then shot Kismayu, age 5, through the forehead. Sharon ran out the door. Banks shot her in the back. N.T. vol. IV, p. 1607, 1699.

Next Banks chased Scott, the nephew, down the hallway, until the boy tripped. Banks hit him with the gun, grabbed him by the neck, and accused him of using a racial epithet against Banks' son. The crying boy, age 7, said he didn't do it. Banks shot him in the back of the head.

Meanwhile, Sharon's mother tried to telephone the police. Banks spotted her and shot her between the eyes, blowing off the top of the skull. Her two sons, ages 9 and 11, were present. Banks told them he would get them next time, and left. The boys picked up the phone from their mother's body and completed the call to the police.

Authorities soon arrived at both crime scenes. All the shooting victims at the trailer were dead. At Banks' house, police discovered Banks' paramour Regina on a living room couch. She had been shot in the face. Banks' paramour Susan was in an armchair, with shots to the head and chest. In her arms was her daughter with Banks, Mauritania. The child, age 1, had been shot behind the ear. Also in the room was Banks' paramour Dorothy, who had been shot through the chest and neck, and Banks' son Bowende, age 4, shot in the face. Upstairs police found the body of Banks' daughter Montanzima, age 6, shot through the chest. In another bedroom were Dorothy's daughter (by another man), age 11, with defensive wounds through the arms and a fatal shot to the face, and Banks' son Foraroude, age 1, shot in the eye. All were dead at the scene. N.T. vol. II, pp. 818-56; vol. V, pp. 1945-2053.

The two victims from outside Banks' house were rushed to the hospital. The man who had recognized Banks died. The other man, although in critical condition, was evacuated by helicopter to a trauma center and survived.

Later that morning, police located Banks at the house of a friend, and surrounded the residence. Banks was still armed with the assault rifle, along with 112 rounds of ammunition. During the standoff and thereafter, Banks, the son of an interracial couple, complained that he could not get fair treatment because of racial prejudice, and that he had killed his children to spare them the same fate. He declared that he was going to kill himself, since he would die in the electric chair anyway. Despite repeated suicide threats, however, Banks elected to surrender without harming himself. N.T. vol. II, pp. 571-80, 588, 606, 625-26, 705-06, 724, 770.

During processing at the police station, Banks expressed remorse for one of the victims, his son Kismayu. He claimed that that shooting had been accidental. N.T. vol. II, p. 764.

Banks was brought to trial in June 1983 over a period of three weeks, before a jury selected in another portion of the state. Banks' defense team of three attorneys called 28 witnesses, including three forensic psychiatrists, to testify to Banks' love for his children and disturbed state of mind. Through his lawyers, his experts, and his own statements and testimony, Banks presented a variety of defense themes to the jury: 1) that he had amnesia and could not

remember the actual shootings;[5] 2) that he killed his children to save them from a life of racial prejudice; 3) that he was the victim of a police conspiracy to tamper with the evidence and cast him in a more culpable light; 4) that he was under the influence of alcohol and pills; and 5) that he was legally insane.[6]

On June 21, 1983, the jury returned guilty verdicts on twelve counts of first degree murder, one count of third degree murder, one count of attempted murder, and the remaining assault, robbery and theft charges. The next day, the court convened a sentencing hearing before the same jury. The Commonwealth sought to prove three aggravating circumstances: that Banks knowingly created a grave risk of death to other persons, 42 Pa. C.S.A. § 9711(d)(7); that he had a significant history of felony convictions involving violence, 42 Pa. C.S.A. § 9711(d)(8); and that he had been convicted of another offense committed at the time of the offenses at issue for which a sentence of life imprisonment or death was imposable, 42 Pa. C.S.A. § 9711(d)(10). Banks and his counsel, on the other hand, sought to demonstrate the presence of three mitigating circumstances: that Banks was under the influence of extreme mental or emotional disturbance, 42 Pa. C.S.A. § 9711(e)(2); that he had a substantially impaired capacity to appreciate the criminality of his conduct, or to conform

[5] The defense secured blood, CAT, and EEG examinations of Banks, and later repeated the tests a second time to evaluate potential organic problems. The results were negative. N.T. vol. III, pp. 1029-31.

[6] A search of defendant's house revealed a notebook entry written *before* the crimes, in Banks' handwriting: "Not guilty, due to temporary insanity induced by the racial abuse of my family and young children." N.T. vol. IV, p. 1583.

his conduct to the requirements of the law, 42 Pa. C.S.A. § 9711(e)(3); and "any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense," 42 Pa. C.S.A. § 9711(e)(8).

The jury found the presence of one aggravating circumstance (the multiple murder aggravator, (d)(10)), and weighed this against the mitigating evidence. Pet. App. 117-18. The jury returned twelve death sentences.

Banks appealed directly to the Pennsylvania Supreme Court, as is the rule in Pennsylvania death penalty cases. 42 Pa. C.S.A. § 9711(h); Pa. R.A.P. 1941. The state supreme court affirmed on February 13, 1987, and denied reargument on May 28, 1987. *Commonwealth v. Banks*, 521 A.2d 1, 1-4 (Pa. 1987), reprinted at Joint App. 70-118. Banks' judgment became final when this Court denied *certiorari* on October 5, 1987. *Banks v. Pennsylvania*, 484 U.S. 873 (1987).

Several years later, in February, 1989, Banks filed a petition for collateral review under the Pennsylvania Post Conviction Relief Act ("PCRA"), 42 Pa. C.S.A. §§ 9541-46. He alleged, for the first time, that the trial court's sentencing instructions violated *Mills* by requiring that the jury be unanimous with respect to any mitigating circumstances. The PCRA court denied relief, however, and the Pennsylvania Supreme Court affirmed this decision on March 27, 1995. Joint App. 119-38.

In 1996, Banks filed a Petition for Writ of Habeas Corpus in federal court. Joint App. 3. He raised eleven claims, three of which had never been presented to the state courts. The district court denied the petition with prejudice, finding that the eight exhausted claims were meritless, and the others procedurally defaulted. *Banks v.*

Horn, 939 F. Supp. 1165, 1167, 1176 (M.D. Pa. 1996). The Third Circuit, however, found that the new claims were not defaulted, because the state court *might* yet entertain them – Banks had filed a second PCRA petition in state court in 1997, which was still pending. *Banks v. Horn*, 126 F.3d 206, 214 (3d Cir. 1997). Accordingly, the Third Circuit vacated the decision of the district court and directed that the petition should be dismissed without prejudice. *Id.*

The state courts, however, rejected Banks' second PCRA petition as untimely, pursuant to the one-year PCRA time limit that had become effective in 1996. *Commonwealth v. Banks*, 726 A.2d 374, 376 (Pa. 1999); *see* 42 Pa. C.S.A. § 9545(b). Banks returned to federal court and filed another habeas petition. The district court again ruled that the claims first raised in Banks' second PCRA petition, which had now been conclusively determined as untimely, were defaulted. *Banks v. Horn*, 49 F. Supp. 2d 400, 412 (M.D. Pa. 1999). As to the remaining claims, which had been properly presented in state court, the district court denied relief on the merits. *Banks v. Horn*, 63 F. Supp. 2d 525 (M.D. Pa. 1999), Pet. App. 129-176.

On appeal, however, the Third Circuit reversed and granted Banks a new sentencing hearing based on the *Mills* claim. 271 F.3d 527 (3d Cir., Oct. 31, 2001), reprinted at Pet. App. 72-120. The Third Circuit refused to consider whether *Mills* could properly be applied retroactively to pre-*Mills* cases like this one, because the state court had been able to resolve the *Mills* claim on the merits, without addressing the retroactivity issue. Pet. App. 98-104. After rehearing was denied, this Court granted the Commonwealth's Petition for Writ of *Certiorari*, and simultaneously issued a *per curiam* opinion reversing the Court of Appeals' judgment. The Court explained that federal habeas courts *must*

decide the retroactivity question when properly raised by the state, and directed the Third Circuit to do so. Pet. App. 62-68. This Court also noted that the circuits are split on the question of whether *Mills* is retroactive. Pet. App. 66 & n.4.

On remand, both parties filed supplemental briefs in the Court of Appeals on the retroactivity question, and on January 14, 2003, the Third Circuit issued its latest opinion, holding that *Mills* did not create a new rule at all and therefore its holding can be applied to this case. *Banks v. Horn*, 316 F.3d 228 (3d Cir. 2003), Pet. App. 1-38. Two judges joined the opinion of the court; the third member of the panel concurred separately.[7] The concurrence recognized that *Mills* was indeed a new rule, and that it did not satisfy either of the two exceptions permitting retroactivity under *Teague v. Lane*, 489 U.S. 288 (1989). Nevertheless, despite this Court's clear instruction that *Teague must* be applied when properly raised by the state on federal habeas review (regardless of the disposition of the claim in state court), the concurrence wrote that *Teague* has no application where, as here, the state courts have reached the merits of the underlying claim. Pet. App. 39-57.

The Commonwealth filed a second Petition for Writ of *Certiorari* in this Court on April 14, 2003. This Court granted the petition on September 30, 2003.

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[7] Pursuant to Third Circuit IOP 15.2 (governing death penalty appeals), the same three Third Circuit judges (Sloviter, Roth and Rendell, JJ.) decided both the 2001 appeal (granting the writ based on *Mills*) and the 2003 remand (finding that *Mills* could be applied to this case despite the rule against retroactivity).

SUMMARY OF THE ARGUMENT

Respondent's thirteen capital convictions became final at the conclusion of his direct appeal process in 1987. In 1988, this Court decided *Mills v. Maryland*, 486 U.S. 367 (1988). Now, fifteen years later, the United States Court of Appeals for the Third Circuit has applied *Mills* retroactively to void the death sentences on collateral review.

This result violates the retroactivity bar established by this Court in *Teague v. Lane*, 489 U.S. 288 (1989). *Mills* created a new rule of law. Contrary to the Third Circuit's conclusion, that rule was not dictated by *Lockett v. Ohio*, 438 U.S. 586 (1978), and its progeny. At best it may be said that the *Lockett* precedent supported the result in *Mills*; but that is not enough to overcome the *Teague* bar. A rule is new unless any other result would have been unreasonable. Yet members of this Court have stated that the issue in *Mills* was not even controlled, let alone *compelled*, by *Lockett*. The states were in no better position than those justices to foresee *Mills* before it was decided. They were certainly aware of *Lockett*, and took rapid steps to implement its holding by broadening mitigation categories. But they could not have known before *Mills* arose that the *Lockett* line would someday require them to reconsider normal unanimity rules when it came to juror consideration of mitigating circumstances. This Court, in *Saffle v. Parks*, 494 U.S. 484 (1990), has for *Teague* purposes distinguished between rules that govern *what* evidence may be considered, like that in *Lockett*, and rules that govern *how* evidence may be considered, like that in *Mills*. *Lockett* principles may inform the *Mills* result, but they do not dictate it.

Nor does the new rule of *Mills* satisfy either of the two narrow exceptions allowing retroactive application on collateral review. *Mills* did not place private individual conduct beyond the power of the state to proscribe. Neither did it uncover a hitherto unknown bedrock principle of due process akin to the right to indigent counsel. This Court has several times rejected *Teague* second-exception status for new rules governing consideration of aggravating and mitigating circumstances. *Mills* is not categorically different.

Even if the application of *Mills* in this case did not violate the retroactivity bar, it would certainly violate the AEDPA deference requirement. The instruction here, which tracked Pennsylvania's capital sentencing statute, did not preclude individual consideration of mitigating evidence; on the contrary, it required jurors to weigh aggravating factors against any mitigating evidence unless they all agreed that there were **no** mitigating circumstances proven. The Third Circuit itself originally held that such an instruction comported with *Mills*. The Pennsylvania courts followed that decision. Years later, but before AEDPA, the Third Circuit effectively overruled its previous *Mills* analysis, explicitly acknowledging that the issue was debatable. Now the court has begun applying that pre-AEDPA ruling as if it were decisive in post-AEDPA cases like this one. That is a far cry from the deference required by the statute. The Pennsylvania courts' application of *Mills* – as reflected in the Third Circuit's own original views on the question – was not erroneous, nor by any means unreasonable.

The Court of Appeals' current *Mills* pronouncement contravenes the *Teague* constraint against retroactive application of new rules on collateral review. It conflicts

with the AEDPA command of deference to the reasonable judgments of state courts. The decision below must be reversed.

ARGUMENT

I. The rule of *Mills v. Maryland* should not be applied retroactively.

The Third Circuit granted relief to Banks based on a perceived violation of *Mills v. Maryland*, 486 U.S. 367 (1988). *Mills*, however, was decided after Banks' judgment became final. The primary question presented by this case, therefore, is whether *Mills* can be applied retroactively.[8]

In its latest opinion, the Third Circuit continues to demonstrate a basic misunderstanding of the *Teague* rule against retroactivity. In 2001, the Court of Appeals mistakenly held that the federal courts may ignore the retroactivity question altogether where the state courts have not first considered it. This year, required to address *Teague*, the court fundamentally misapplied *Teague's* "new rule" jurisprudence. The court held that *Mills* was not a new rule, that no reasonable jurist could possibly have disagreed with the outcome in that case, and that any alternative result in *Mills* would have been "completely

[8] Three members of this Court have suggested that the "*Mills*" rule – the prohibition of a unanimity requirement for mitigating circumstances in capital cases – was not decided in *Mills* at all, because the question was not presented. *See McKoy v. North Carolina*, 494 U.S. 433, 457-63 (1990) (Scalia, J., with Rehnquist, C.J., and O'Connor, J., dissenting). Under this view, then the "*Mills* rule" is really the "*McKoy* rule."

untenable." Pet. App. 30. The court even suggested that *Mills* was such a predictable application of older law that its very existence might be "irrelevant." Pet. App. 34 n.13. As explained below, this new rule conclusion is wrong, and its overstatement is remarkable. Nor does *Mills* qualify for the narrow exceptions to the *Teague* bar on retroactive application of new rules of law.

A. *Mills* was a new rule within the meaning of *Teague*.

This Court has strictly limited retroactive application of new rules to judgments that are already final. Prior to that point, it is possible, and at times even advisable, to tinker with procedure. But such procedural adjustments rarely lead to fundamental breakthroughs in fairness that would justify the reversal of all prior convictions. There are costs associated with retroactivity: "Application of constitutional rules not in existence at the time a conviction becomes final seriously undermines the principle of finality which is essential to the operation of our criminal justice system." *Teague*, 489 U.S. at 309. Nor does retroactive application of new rules serve the deterrent function at the heart of habeas corpus. The threat that a criminal conviction might one day be overturned pursuant to a future rule does not deter state courts from conducting criminal proceedings unlawfully, because state judges will not be influenced by federal court enforcement of a rule that does not yet exist.

The standards for determining if a rule is "new" reflect these principles. "A holding constitutes a 'new rule' within the meaning of *Teague* if it 'breaks new ground,' . . . or was not *dictated* by precedent existing at the time the

defendant's conviction became final." *O'Dell v. Netherland*, 521 U.S. 151, 156 (1997) (citations omitted) (emphasis in original). Put another way, a rule is not new if a state court considering the claim at the time the judgment became final "would have felt compelled to conclude that the rule [he] seeks was required by the Constitution." *Lambrix v. Singletary*, 520 U.S. 518, 521 (1997), *quoting Saffle v. Parks*, 494 U.S. 484, 488 (1990).

Accordingly, this Court classifies most rules – even "gradual developments in the law" – as "new" under *Teague*. *See Sawyer v. Smith*, 497 U.S. 227, 234-36 (1990) (purpose of *Teague* is to prevent disruption of final judgments by "gradual developments in the law," which should be viewed as "new"). *See also O'Dell*, 521 U.S. at 153 (rule of *Simmons v. South Carolina*, 512 U.S. 154 (1994), requiring jury to be instructed that life sentence carries no possibility of parole if defendant's future dangerousness is at issue, would be new under *Teague*); *Lambrix*, 520 U.S. at 528 (rule of *Espinosa v. Florida*, 505 U.S. 1079 (1992), that sentencer in "weighing" state may not constitutionally consider invalid aggravating circumstances, was new under *Teague*); *Gray v. Netherland*, 518 U.S. 152, 167 (1996) (new rule required for holding that due process mandated more than a day's notice of new evidence to be presented at capital sentencing hearing); *Gilmore v. Taylor*, 508 U.S. 333, 344 (1993) (rule mandating explicit instruction to jury – not to return murder conviction if mitigating mental state is found – would be new under *Teague*); *Graham v. Collins*, 506 U.S. 461, 477 (1993) (rule that Texas capital instructions excluded relevant categories of relevant evidence would be new under *Teague*); *Saffle v. Parks*, 494 U.S. 484, 489 (1990) (prohibition of "anti-sympathy" instruction in capital case is new rule).

Despite this Court's careful approach to the new rule question, the Third Circuit had little trouble concluding that *Mills* was not new at all. The court's reasoning was simple: *Mills* is about allowing consideration of mitigating evidence; this Court has held, most prominently in *Lockett v. Ohio*, 438 U.S. 586 (1978), that the jury must be allowed to consider mitigating evidence; therefore *Mills* was already the law before it existed. Once this Court had decided *Woodson v. North Carolina*, 428 U.S. 280 (1976) (striking down statute making death sentence mandatory on conviction); *Roberts v. Louisiana*, 428 U.S. 325 (1977) (same); *Lockett* (defendant improperly prohibited from presenting mitigating evidence concerning his character and offense); and *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (defendant improperly prohibited from presenting evidence of family background), the die was cast, and any reasonable jurist should have known what the result in *Mills* would be. Pet. App. 17-20.[9]

Indeed, the Third Circuit ventured even further into the pre-*Mills* universe to discover its creation. The court pointed to this Court's decision in *Andres v. United States*, 333 U.S. 740 (1948), forty years before *Mills*. *Andres*, interpreting the then federal death penalty statute, held that a capital sentence could not follow automatically from a jury determination of guilt, even if the jury had the

[9] The Third Circuit also relied on *Skipper v. South Carolina*, 476 U.S. 1 (1986) (defendant improperly prohibited from presenting mitigating evidence concerning prison adjustment); *California v. Brown*, 479 U.S. 538 (1987) (jury properly instructed not to be swayed by mere sentiment or sympathy); and *Hitchcock v. Dugger*, 481 U.S. 393 (1987) (defendant improperly prohibited from presenting nonstatutory mitigating evidence). Pet. App. 20-22.

discretion to take the extra step of affirmatively excluding death. According to the Third Circuit, *Andres* "invokes . . . themes . . . consistent with" the current rule that juries need not be unanimous on particular mitigating circumstances during the weighing process. *Andres*, therefore, along with the *Lockett* line of cases, rendered unreasonable any conclusion other than that eventually reached in *Mills*. Pet. App. 22-24. By the time 1988 rolled around, *Mills* was not only not new – it was, by the lights of the Third Circuit, banal.

The difficulty with the Third Circuit's analysis is that, if *Mills* was already the law at least a decade if not four before it was actually decided, the news was well hidden even from members of this Court. Even in *Mills* itself, there was no indication that the Court had previously addressed, let alone dictated a result on, the question of whether individual jurors (as opposed to the sentencer per se) must be allowed to consider mitigating factors at the weighing stage. The majority in *Mills* did quote the *Lockett* cases for the "well established" proposition that "the sentencer may not . . . be precluded from considering any relevant mitigating evidence." 486 U.S. at 374-75 (emphasis and internal quotation marks deleted). But there was no dispute that the jury in *Mills* could deliberate on any evidence that the defendant chose to present. The crucial issue was whether, in the absence of unanimity, individual jurors must be permitted to carry over that consideration from the fact-finding stage into the weighing stage.

Certainly the *Lockett* line, and even *Andres*, were authority for the resolution of that issue; contrary to the Third Circuit's understanding, however, the existence of prior precedent, even "controlling" prior precedent, cannot

resolve the *Teague* new rule question. The Third Circuit's review concluded that *Mills* was an application of previous case law. But if this analysis were sufficient, it would swallow up the new rule rule. Virtually every case is said to be controlled by prior law. Only in rare instance does the Court explicitly depart from stare decisis. Yet under *Teague* the Court has found almost every rule to be new, and has established that the standard for determining "newness" is not whether a decision resulted from prior precedent. Instead, a rule is new whenever it is the product of reasoned debate rather than indisputable mandate.

This Court's followup to *Mills*, *McKoy v. North Carolina*, 494 U.S. 433 (1990), makes the newness point even more plainly. That case, decided two years later, demonstrates that the *Mills* rule was not an indisputable conclusion even after *Mills* itself. Four current members of the Court disputed that the outcome in *Mills* was "controlled or governed" by *Lockett* and *Eddings*, let alone dictated by those decisions. *See McKoy*, 494 U.S. at 452-56 (Kennedy, J., concurring); *id.* at 471 (Scalia, J., dissenting, with Rehnquist, C.J., and O'Connor, J.). The Third Circuit brushes aside the import of these *McKoy* opinions, on the ground that they are not a majority. Pet. App. 33. Obviously not; but this misses the point. The significance of the *McKoy* concurrence and dissent for new rule purposes is that four justices of this Court clearly did not understand the *Mills* rule to be **dictated** by pre-*Mills* precedent.[10]

[10] The *Mills* majority itself concluded its opinion with a reference to "[e]volving standards of societal decency," 486 U.S. at 383 – surely a suggestion of new development in the law.

Indeed, the legal world outside this Court was similarly unaware of the putative pre-*Mills Mills* rule that is now so clear to the Third Circuit. In Ohio, for example, the state quickly responded to the *Lockett* decision by amending its capital sentencing statute to open up the categories of mitigating evidence permitted to the defense. *See State v. Watson*, 572 N.E.2d 97, 112 (Ohio 1991) (describing post-*Lockett* amendments to Ohio death penalty law). But the state failed to discern from *Lockett* or its progeny any mandate that would affect the *manner* in which the jurors considered this broader mitigation evidence, whether unanimously or individually, during fact-finding or during weighing. That development did not occur until **after** *Mills*, when the state courts adopted new instructions specifying that individual jurors could weigh mitigating circumstances absent unanimity. *See State v. Brooks*, 661 N.E.2d 1030, 1042 (Ohio 1996) (announcing new post-*Mills* non-unanimity instruction).

A similar process took place in Maryland. There the state immediately added a "catch-all" mitigating factor to its sentencing statute after *Lockett*, *see Mills v. State*, 527 A.2d 3, 27 (Md. 1987) (McAuliffe, J., dissenting), but made no change to its unanimity and weighing instructions until after its decision in *Mills* itself. And the same thing happened in Pennsylvania. *See* 42 Pa. C.S.A. § 9711(e)(8) ("[a]ny other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense") (added September 13, 1978); Pa. R. Crim. P. 807 (prescribing verdict sentencing slip to identify mitigating

circumstances "found by one or more of us"; adopted February 1, 1989, citing to *Mills*).[11]

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[11] Similarly, the North Carolina death penalty instructions were also changed two separate times – after *Lockett*, and after *Mills*. *See State v. McDougall*, 301 S.E.2d 308, 326-28 (N.C.) (explaining new post-*Lockett* instructions in North Carolina), *cert. denied*, 464 U.S. 865 (1983); *State v. Lee*, 439 S.E.2d 547, 569 (N.C.) (describing new post-*Mills* instruction), *cert. denied*, 513 U.S. 1035 (1994).

In fact, before *Mills* courts might reasonably have assumed that jury unanimity at all phases of capital sentencing was not only permitted but preferred. In *Furman v. Georgia*, 408 U.S. 238 (1972), this Court invalidated the death penalty, largely on the ground that capital sentencing discretion was insufficiently limited. More than half of the states that enacted new death penalty statutes in response to *Furman* adopted *mandatory* death penalty laws – that is, the jury (or judge) had *no* discretion to reduce the penalty for specified offenses. *See Rockwell v. Superior Court of Ventura County*, 18 Cal. 3d 420, 448 (1976).

Even when this Court later invalidated mandatory death penalty statutes, the principle of limited discretion remained. *See Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ., announcing judgment of the Court) ("[jury] *discretion must be suitably directed and limited* so as to minimize the risk of wholly arbitrary and capricious action.") (emphasis supplied). In accordance with that principle, for example, states may require the defendant to prove mitigating circumstances by a preponderance of the evidence. *Walton v. Arizona*, 497 U.S. 639, 649-51 (1990) (Opinion by White, J.). Before *Mills* and *McKoy*, courts might understandably have concluded that, just as a preponderance burden was an appropriate means of limiting discretion (the defendant must prove the existence of mitigating circumstances), so too was a unanimity process (the defendant must prove the existence of mitigating circumstances *to every juror*).

Moreover, as the dissent in *McKoy* noted, this Court has previously *approved* unanimity requirements in similar contexts. *See Martin v. Ohio*, 480 U.S. 228 (1987) (approving unanimity requirement as condition to establishing self-defense in capital murder case); *Patterson v. New York*, 432 U.S. 197 (1977) (as condition to establishing defense of extreme emotional disturbance in murder case); *Rivera v. Delaware*, 429 U.S. 877 (1976) (as condition to establishing defense of insanity in murder case).

These jurisdictions recognized what this Court itself made explicit in *Saffle v. Parks*, 494 U.S. 484 (1990): that the *Lockett* principle does not dictate all succeeding rules concerning mitigating evidence in capital cases. In *Saffle*, the defendant argued that *Lockett* mandated an instruction requiring jurors to consider any feelings of sympathy based on mitigating evidence. The Court held that any such rule would be new under *Teague*. "There is a simple and logical difference between rules that govern what factors the jury must be permitted to consider in making its sentencing decision and rules that govern how the State may guide the jury in considering and weighing those factors in reaching a decision." 494 U.S. at 490. *Mills*, like *Saffle*, was not about the **kind** of mitigating evidence a jury may consider, but about the **way** the evidence may be considered – collectively or individually, at each stage of deliberation. Just like *Saffle*, *Mills* was a novel rule.[12]

To be "dictated" by prior precedent, a rule must be logically *necessary* from the cases preceding it. Where it is

[12] The Court of Appeals below struggled to distinguish *Saffle*. The court asserted that *Mills* was actually about "what" mitigating evidence could be considered, rather than "how," because an *individual* juror might have been precluded from considering any mitigating evidence (at least at the weighing stage) if others did not agree with him. Pet. App. 35. But the defendant in *Saffle* made exactly the same argument: absent the requested instruction, any juror who saw the defendant's mitigation in terms of sympathy might have been barred from considering the evidence at all. 494 U.S. at 492. The point of *Saffle* is not the *quantum* of evidence potentially affected by alleged error. The point, rather, is that the *Lockett* cases addressed the outright exclusion of particular *categories* of mitigating evidence, precluding consideration at any stage, by any juror. Other cases, like *Mills* and *Saffle*, addressing the mitigation *process*, may or may not be resolved under *Lockett* precedent; but they are not *dictated* by it.

not, or even where there is doubt, *Teague* demands that the "good faith" decisions of state courts must be validated. Under this standard, *Mills* was clearly new, and its retroactive application should be barred.

B. *Mills* does not meet either of the exceptions to *Teague*.

Teague recognizes that in rare cases a new rule might still receive retroactive application. But no judge below has found that the *Mills* rule in question here warrants an exception to the retroactivity bar, and the concurring judge specifically found that it does not. Nor is there any basis for a contrary conclusion.

There are two exceptions under *Teague*, but only one of these is even arguably relevant in the *Mills* context.[13] This is the so-called "second *Teague* exception"; as this Court has explained, "[a] rule that qualifies under this exception must ... 'alter our understanding of the bedrock procedural elements' essential to the fairness of a proceeding." *Sawyer*

[13] The first *Teague* exception is for rules that place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Teague*, 489 U.S. at 311, *quoting Mackey v. United States*, 401 U.S. 667, 692 (1971) (Harlan, J., concurring in part and dissenting in part). In *Mackey*, Justice Harlan gave as one example (among others) the rule of *Griswold v. Connecticut*, 381 U.S. 479 (1965), where the Court held that a Connecticut law criminalizing the use of contraceptives by married people violated substantive due process. 401 U.S. at 693 n.7. More recently, this Court has suggested that the second *Teague* exception might encompass a claim that a mentally retarded prisoner cannot be executed. *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989), *overruled on other grounds*, *Atkins v. Virginia*, 536 U.S. 304 (2002).

v. Smith, 497 U.S. 227, 242 (1990), *quoting Teague*, 489 U.S. at 311.

This Court has never held that *any* new rule meets this difficult standard. Instead, the Court has offered limited examples of fundamental principles, now long established, that illustrate the narrowness of the second exception. For example, the rule of *Gideon v. Wainwright*, 372 U.S. 335 (1963) – announcing the right of criminal defendants to be represented by counsel – is the sort of "bedrock procedural element" envisioned by *Teague*. *Saffle*, 494 U.S. at 495.

Such rules protect not only our fundamental sense of fairness and legal order, but the factual accuracy of the guilt-determining process as well. This is by careful design: *Teague* made clear that its second exception is limited to those new rules that are *both* "implicit in the concept of ordered liberty" *and* "central to an accurate determination of innocence and guilt." 489 U.S. at 311-13. Not surprisingly, this Court has warned that the second *Teague* exception will be rare in application, and that "we believe it unlikely that many such components of basic due process have yet to emerge." *Teague*, 489 U.S. at 313. *See also Graham*, 506 U.S. at 478 (this exception is "meant to apply only to a small core of rules") (internal quotations omitted).

On the other hand, the list of rules that do *not* meet the second *Teague* exception is long. *See, e.g., O'Dell v. Netherland*, 521 U.S. 151, 167 (1997) (rule of *Simmons v. South Carolina,* requiring that jury be instructed of defendant's parole-ineligibility if prosecution argues that he poses a future danger, not a watershed rule under *Teague*); *Lambrix v. Singletary*, 520 U.S. 518, 539-40

(1997) (rule of *Espinosa v. Florida* – that if judge in "weighing" state is required to give weight to jury's sentencing recommendation, neither judge nor jury can consider invalid aggravating circumstance – does not qualify for second *Teague* exception); *Graham*, 506 U.S. at 478 (proposed new rule requiring special jury instruction concerning mitigating evidence would not qualify for *Teague* exception); *Sawyer*, 497 U.S. at 241-44 (rule of *Caldwell v. Mississippi*, 472 U.S. 320 (1985), that Constitution prohibits imposition of death sentence where sentencer has been led to believe that ultimate responsibility for determining appropriateness of punishment lies elsewhere, not "watershed rule" under *Teague*).

The *Mills* rule does not qualify for the second *Teague* exception, either. This Court has repeatedly denied second exception protection for changes to the process of considering aggravating and mitigating circumstances. *See Sawyer; Graham; Lambrix*. In each case it was argued that the changes would enhance the accuracy and fairness of the proceeding. That is true to at least some degree, however, as to any new rule that the Court would choose to adopt. As the Court observed in *Sawyer*, "[i]t is difficult to see any limit to the definition of the second exception if cast" in such terms. 497 U.S. at 243. Surely the *Caldwell* rule at issue there established an important principle: "that the Eighth Amendment prohibits the imposition of a death sentence by a sentencer that has been led to the false belief that the responsibility for determining the appropriateness of the defendant's capital sentence rests elsewhere." *Sawyer*, 497 U.S. at 233. But *Caldwell*'s improvement in the capital sentencing process, like *Mills*', was not the sort of bedrock element equivalent to the right to counsel established in *Gideon*. For thirty years this

Court has worked to harmonize the two principles of its capital jurisprudence: guiding discretion while permitting mitigation. *Mills* was a notable leg in that winding journey; but it does not rise to the level of *Teague*'s second exception.

Accordingly, this Court should hold that the *Mills* rule is new within the meaning of *Teague*, and that it does not meet either of the exceptions to the retroactivity bar.[14]

[14] The concurring opinion in the court of appeals agreed with the Commonwealth's position on both these points, but nonetheless argued that the Third Circuit was free to disregard *Teague*. This approach flies in the face of this Court's opinion in this very case last year, ordering consideration of *Teague*. Pet. App. 61-68.

Ignoring that directive, the concurring opinion noted that, when the Pennsylvania Supreme Court reviewed this case on collateral appeal, it employed a "relaxed waiver" rule that allowed Banks to overcome a procedural default. The concurrence then maintained that, since the state court here reached the merits of the *Mills* claim, the federal courts should get the same opportunity, even if they have to set aside *Teague* to do so, because *Teague* is just a rule of "comity." This argument is misplaced on every level.

Preliminarily, Pennsylvania's waiver rules had nothing to do with its treatment of the retroactivity question here. The state supreme court noted that some of Banks' claims may have been defaulted by failing to preserve them during the direct appeal process, but that the court would relax its default rule for purposes of Banks' collateral appeal. Joint App. 122 n.7. Having done so, however, the court remained free to address the retroactivity of *Mills*, as it has done in numerous other collateral appeals. *See* n.19 *infra*. Retroactivity is not a species of procedural default; it is a substantive inquiry necessary to determine what is the applicable law. The state court chose not to base its decision here on retroactivity grounds simply because it was not asked to do so, and because it had available precedent that readily disposed of the *Mills* claim on the merits. The "relaxed waiver" practice discussed in the concurring opinion was irrelevant to the state court's

(Continued on following page)

II. The Pennsylvania Supreme Court's rejection of the *Mills* claim was a reasonable application of federal law.

Even if this Court were to find that the rule of *Mills* was not new, or if it is retroactive, there is one more issue here – the merits. The court below engaged in a textbook misapplication of the AEDPA standard of review when it considered the merits of Banks' *Mills* claim in its 2001

disposition of the *Mills* claim on the merits rather than through retroactivity analysis.

Nor does anything about the state court's approach somehow excuse the federal habeas courts from their obligation to apply *Teague*. The concurrence averred that the state court, because it reviewed the *Mills* claim on its merits, treated the claim "as on" direct appeal. Pet. App. 56. In other words, suggested the concurrence, if a state court ever addresses the merits of a claim on collateral review, it's not really collateral review, and the federal courts are released from the *Teague* rule. But the Third Circuit does not have the power to redefine Pennsylvania law on finality of judgment in order to circumvent *Teague*. The Pennsylvania Supreme Court has already ruled, in this very case, that direct review concluded and Banks' conviction became final when the court affirmed it in 1987 and this Court denied certiorari. *Banks*, 726 A.2d at 375. The fact that the state court later entertained claims on collateral review did not reopen or suspend the original judgment.

The inescapable error in the concurrence is its insistence that the purpose of the *Teague* rule is to accord comity to state court decisions. The sole support provided for this declaration is an extended discussion not of *Teague*, but of the exhaustion doctrine. Indeed, fully half of the pertinent section of the concurring opinion addresses exhaustion. Pet. App. 54-56. But retroactivity is not equivalent to exhaustion, any more than it is the same as procedural default. There is no "comity" excuse for failing to follow *Teague*. The Third Circuit tried that approach in the previous round of litigation here, when it took the position that it was absolved from *Teague* because the state court did not address retroactivity. Pet. App. 100-03. Now the concurring opinion has resurrected the same rationale – but without acknowledging that this Court squarely rejected that position last year. Pet. App. 65-67.

opinion. The court explicitly re-instated this analysis in its latest opinion. Pet. App. 38. Because the instructions reviewed in this case mirrored the Pennsylvania standard instructions in effect until approximately 1990, the Third Circuit's merits decision has been relied upon, and followed, in many other cases.[15]

Under the current habeas statute – as amended by the Anti-terrorism and Effective Death Penalty Act of 1996 ("AEDPA") – the writ cannot be granted unless the state court's decision was contrary to, or an unreasonable application of, clearly established federal law, as established by this Court. 28 U.S.C. § 2254(d)(1). This Court has repeatedly emphasized that AEDPA means what it says: State court decisions *must* stand unless they are unreasonable, even if the federal courts disagree with the result. This principle has been illustrated in the past year by three unanimous reversals of Ninth Circuit opinions in which the Court of Appeals had overreached this plain standard. *See Yarborough v. Gentry*, 72 U.S.L.W. 3275 (October 20, 2003) (state court's rejection of claim that counsel presented an ineffective closing argument was reasonable application of Sixth Amendment law); *Woodford v. Visciotti*, 537 U.S. 19 (2002) (California courts' rejection of ineffectiveness claim in capital case was

[15] *Kindler v. Horn*, 2003 WL 22221208 *12-16 (E.D. Pa. 2003); *Fahy v. Horn*, 2003 WL 22017231 *41-42 (E.D. Pa. 2003); *Wallace v. Price*, 265 F. Supp. 2d 545, 569-71 (W.D. Pa. 2003); *Porter v. Horn*, 276 F. Supp. 2d 278, 299 (E.D. Pa. 2003); *Henry v. Horn*, 218 F. Supp. 2d 671, 679 (E.D. 2002); *Peterkin v. Horn*, 179 F. Supp. 2d 518, 521 (E.D. Pa. 2002); *Abu-Jamal v. Horn*, 2001 WL 1609690 *1 (E.D. Pa. 2001). Many other cases with similar claims are presently before federal district courts and the Third Circuit on habeas review, and have yet to be decided.

reasonable application of ineffectiveness standard, despite possible disagreement on the merits), and *Early v. Packer*, 537 U.S. 3 (2002) (state court's determination that trial judge's comments were improper was neither contrary to, nor unreasonable application of, federal law).[16]

The interpretation of jury instructions is exactly the kind of issue that is susceptible to reasonable disagreements. Here, the state supreme court found that the jury instructions did not violate *Mills*, and has repeated that holding many times. Indeed, when the *Mills* issue first reached federal court, a prior Third Circuit panel *agreed* with this conclusion and upheld an almost identical set of instructions. Then in this case the appeals court (following

[16] Although the Third Circuit has received less attention than the Ninth by way of AEDPA review in this Court, it has been at least as active in the death penalty arena: in the last decade, federal courts in Pennsylvania have granted the writ in *every* contested state capital habeas matter, over twenty cases to date. *Carpenter v. Vaughn*, 296 F.3d 138 (3d Cir. 2002); *Szuchon v. Lehman*, 273 F.3d 299 (3d Cir. 2001); *Jermyn v. Horn*, 266 F.3d 257 (3d Cir. 2001); *Appel v. Horn*, 250 F.3d 203 (3d Cir. 2001); *Kindler v. Horn*, 2003 WL 22221208 (E.D. Pa. 2003); *Fahy v. Horn*, 2003 WL 22017231 (E.D. Pa. 2003); *Wallace v. Price*, 265 F. Supp. 2d 545 (W.D. Pa. 2003); *Porter v. Horn*, 276 F. Supp. 2d 278 (E.D. Pa. 2003); *Yarris v. Horn*, 230 F. Supp. 2d 577 (E.D. Pa. 2002); *Henry v. Horn*, 218 F. Supp. 2d 671 (E.D. Pa. 2002); *Hackett v. Price*, 212 F. Supp. 2d 382 (E.D. Pa. 2001); *Pursell v. Horn*, 187 F. Supp. 2d 260 (W.D. Pa. 2002); *Peterkin v. Horn*, 179 F. Supp. 2d 518 (E.D. Pa. 2002); *Holloway v. Horn*, 161 F. Supp. 2d 452 (E.D. Pa. 2001); *Laird v. Horn*, 159 F. Supp. 2d 58 (E.D. Pa. 2001); *Holland v. Horn*, 150 F. Supp. 2d 706 (E.D. Pa. 2001); *Abu-Jamal v. Horn*, 2001 WL 1609690 (E.D. Pa. 2001); *Bronshtein v. Horn*, 2001 WL 767593 (E.D. Pa. 2001); *Hardcastle v. Horn*, 2001 WL 722781 (E.D. Pa. 2001); *Jacobs v. Horn*, 129 F. Supp. 2d 390 (M.D. Pa. 2001); *Rompilla v. Horn*, 2000 WL 964750 (E.D. Pa. 2000); *Whitney v. Horn*, 170 F. Supp. 2d 492 (E.D. Pa. 2000), *vacated and remanded*, 280 F.3d 240 (3d Cir. 2002); *Buehl v. Vaughn*, 1996 WL 752959 (E.D. Pa. 1996).

a subsequent precedent that was decided under *pre*-AEDPA law) disagreed with this result and granted relief. Such caprice is exactly what the AEDPA deference standard should preclude.

The trial court, in accordance with the Pennsylvania statute, did not instruct the jury that it must be unanimous to consider any mitigating circumstances; indeed the court instructed that the jury must be unanimous to *reject* any mitigating circumstances. This is the instruction in pertinent part, as quoted by the court below:

> The sentence you impose will depend on your findings concerning aggravating and mitigating circumstances. The Crime Code in this Commonwealth provides that the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance and **no** mitigating circumstances, or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstance or circumstances.
>
> Remember, under the law of this Commonwealth, your verdict must be a sentence of death if you unanimously find at least one aggravating circumstance and **no** mitigating circumstance, or if you unanimously find one or more aggravating circumstances which then outweigh any mitigating circumstances. In all other cases, your verdict would be life imprisonment.

Pet. App. 110-111 (emphasis added).[17]

[17] As quoted in the Third Circuit opinion below. In the trial record, the two photographs actually appear several pages apart. Joint App. 21, 26.

These instructions do not violate *Mills*. They contain no requirement that the jurors be unanimous as to the presence of a particular mitigating factor before they can consider mitigating evidence. In fact, if the jury follows these instructions – and this Court presumes that they did, *see Penry v. Johnson*, 532 U.S. 782, 799 (2001) – then there is no constitutional problem. The jury was directed to proceed in several predictable stages. First, if the jurors unanimously agree that one or more aggravating circumstances have been proved, and they also unanimously agree that **no** mitigating factors are present, then they must return a sentence of death. If they are not unanimous with respect to the absence of mitigating factors – that is, if *any* of them believe that one or more mitigating circumstances are present – the jurors move to the second phase: that is, they *must* weigh aggravating circumstances against mitigating evidence. This is entirely proper, and it does not violate *Mills*.

The premise of the decision below, however, is that the jury could have misunderstood the instructions to mean something they did not say – that the last phrase quoted above, requiring the jurors to weigh "any mitigating circumstances," *might* have misled the jurors into weighing only "any *unanimously found* mitigating circumstances." But such a unanimity requirement simply is not there. The instruction, by its plain language, did not impose a unanimity requirement on the consideration of mitigators. The Third Circuit's contrary decision is nothing more than speculation that confusion was a *possibility*. That is not enough to override the decision of the state supreme court.

Already flawed, the opinion below went even further astray in its effort to appear in compliance with AEDPA.

Accordingly, the Third Circuit declared that **no** jurist could reasonably uphold these instructions in the face of a *Mills* challenge. This is truly a remarkable conclusion, because the Third Circuit has *itself* upheld similar instructions. A decade ago, a different Third Circuit panel rejected the theory that the jurors were reasonably likely to understand a comparable jury charge to require unanimity as to mitigating factors. *See Zettlemoyer v. Fulcomer*, 923 F.2d 284, 308 (3d Cir.), *cert. denied*, 502 U.S. 902 (1991). The instructions at issue in *Zettlemoyer* are set out in the margin;[18] even a cursory reading reveals this charge to be nearly identical to the instructions at issue here – the once-standard Pennsylvania instructions. The state courts, therefore, could – and did – assume that the Third Circuit had approved this charge. *See Commonwealth v. Abu-Jamal*, 1995 WL 1315980 (Phila. Ct. Com. Pls. 1995) (rejecting *Mills* challenge based on Third Circuit's *Zettlemoyer* decision). The Pennsylvania Supreme Court

[18] The trial court in *Zettlemoyer* issued a similar instruction:

> . . . If you find that aggravating circumstance [that the murder victim was a prosecution witness] and find no mitigating circumstances *or if you find that the aggravating circumstance which I mentioned to you outweighs any mitigating circumstance you find*, your verdict must be the death penalty.
>
> * * *
>
> . . . Under the law, as I said, you are obligated by your oath of office to fix the penalty at death *if you unanimously agree and find beyond a reasonable doubt that there is an aggravating circumstances [sic] and either no mitigating circumstance or that the aggravating circumstance outweighs any mitigating circumstances.*

923 F.2d at 307-308 (emphasis added).

continued to reject similar *Mills* claims over the next few years. *See, e.g., Commonwealth v. Travaglia*, 661 A.2d 352, 366 (Pa. 1995); *Commonwealth v. Murphy*, 657 A.2d 927, 936 (Pa. 1995); *Commonwealth v. Smith*, 650 A.2d 863, 867 (Pa. 1994); *Commonwealth v. Wilson*, 649 A.2d 435, 451 n.15 (Pa. 1994).

Years later, however, when Pennsylvania capital cases began reaching the Third Circuit in significant numbers, something changed. The new trend began in *Frey v. Fulcomer*, 132 F.3d 916 (3d Cir. 1997), *cert. denied*, 524 U.S. 911 (1998). As a matter of English structure, the instruction in *Frey* was the same as the *Zettlemoyer* instruction. But the Third Circuit nevertheless found a way to distinguish the earlier case. The *Frey* panel contrived what it called a "sound bite" analysis, essentially requiring the reviewing court to count the number of words that come between the terms "unanimous" and "mitigating" in any given jury charge. 132 F.3d at 923. In *Frey*, the panel found the instruction to fail its "sound bite" test, because the words were too close together – their respective phrases were separated by seven words, rather than the longer seventeen word separation in *Zettlemoyer*. 132 F.3d at 923.

Whatever the merits of the "sound bite" analysis, it has been far from obvious to other federal courts, *see Abdur'rahman v. Bell*, 226 F.3d 696, 712 (6th Cir. 2000) (rejecting claim that proximity of terms "unanimous" and "mitigating circumstances" could have led to jury confusion), *cert. denied*, 122 S. Ct. 386 (2001), let alone to the state courts, which were somehow supposed to divine the sound bite test before the Third Circuit invented it. Remarkably, even in *Frey*, where the test originated, the Third Circuit itself recognized that the Commonwealth's

(and thus the state courts') contrary *Mills* analysis was at the very least "plausible," 132 F.3d at 924. But the *Frey* panel at least had an arguable basis for rejecting the state court's ruling, despite its plausibility, *because Frey was a pre-AEDPA case*. The Third Circuit was not yet required to defer to plausible, *i.e.*, not unreasonable, state court rulings.

With this case, however, and with many others since, the Third Circuit has gone dramatically further. *Frey* is no longer merely the supposedly better interpretation of two plausible alternatives – now, according to the Third Circuit, it is the **only reasonable conclusion**. The motivation for this turnabout is clear: to provide the appearance of compliance with the AEDPA deference standard. But motivation is not explanation, and the Third Circuit has never explained how it could conclude that the state court rulings in question are not just erroneous but beyond reason. In rejecting the state court's *Mills* ruling in its 2001 merits decision, the Court of Appeals did not discuss *Zettlemoyer*, the 1991 case in which it had upheld Pennsylvania's mitigation instruction.[19] Similarly, the court did not even mention its 1997 conclusion in *Frey* that Pennsylvania's interpretation of *Mills* was plausible – and therefore *ipso facto* not unreasonable under AEDPA.[20]

[19] The only passing mention of *Zettlemoyer* in the panel's 2001 opinion appears in a lengthy block quote from *Frey*; *Zettlemoyer* is never specifically identified or explained, and no citation is given. Pet. App. 113. In its 2003 opinion, the panel cites *Zettlemoyer* only to note that the *Mills* retroactivity question was not decided in that case. Pet. App. 9 n.3.

[20] The Pennsylvania Supreme Court, on the other hand, has noted the Third Circuit's flip-flop on *Mills*, and has repeatedly chosen to

(Continued on following page)

Subsequent case law, unlike the decision below, has at least acknowledged the conflict, but has done nothing to resolve it. *See Abu-Jamal*, 2001 WL 1609690 at *120, 126 (despite "linguistically similar" charge in *Zettlemoyer*, court "compelled to conclude" that relief is required by *Banks* and *Frey*).

The Third Circuit's tergiversation on *Mills* is not only unexplained; it is indefensible. To begin with, the court has applied the wrong standard by which to measure jury instructions. While it used to be appropriate to reject jury instructions that *might* be misunderstood, that is no longer the proper test. In *Boyde v. California*, 494 U.S. 370 (1990), this Court specifically rejected evaluative inquiries which primarily emphasized the *possibility* of juror confusion, that is, whether reasonable jurors "*could have*" been confused, or whether there was "*a substantial possibility*" that the jury was confused. *Id.* at 379. The Court in *Boyde* also rejected standards based on the mere possibility that a *single juror* was misled, rather than the jury as a whole. The Court adopted a more deferential and reliable test: "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence."

follow the federal court's original analysis. *See Commonwealth v. Chester*, 733 A.2d 1242, 1256 n.14 (Pa. 1999) (citing *Zettlemoyer* in rejecting *Mills* claim; court also observes that *Frey* failed to apply *Teague* rule to bar retroactive application of *Mills*); *Commonwealth v. Laird*, 726 A.2d 346, 359 n.12 (Pa. 1999) (same); *Commonwealth v. Breakiron*, 729 A.2d 1088, 1097 n.7 (Pa. 1999) (noting disagreement with *Frey*), *cert. denied*, 528 U.S. 1169 (2000); *Commonwealth v. Cross*, 726 A.2d 333, 337-38 (1999) (same; in the alternative, *Mills* should not apply retroactively).

494 U.S. at 380. This carefully reformulated standard requires a more significant showing on the claimant's part in order to demonstrate a constitutional violation, as this Court explicitly recognized. *See id.* ("a capital sentencing proceeding is not inconsistent with the Eighth Amendment if there is only a *possibility* of such an inhibition") (emphasis added); *see id.* at 387 (Marshall, J., dissenting) ("the majority's reasonable likelihood standard *is not met* where a reasonable juror *could* or *might* have interpreted a challenged instruction unconstitutionally") (emphasis added, internal quotation marks omitted).

Here, the Third Circuit repeatedly invoked a pre-*Boyde* standard. The court asked whether the jury "*could have*" interpreted the instructions improperly; the court also re-introduced the single juror standard, asking whether "*a reasonable juror could* so conclude." Pet. App. 112, 116 (emphasis added) (citation omitted). This is clearly not the standard required by law. Only once did the court cite to the correct *Boyde* formulation, *id.* at 109, but it then failed to apply it – the pre-*Boyde* standard is repeated again and again. *See* Pet. App. 106 ("the critical question is ... whether a reasonable jury *could have* interpreted the instructions in an unconstitutional manner") (emphasis added), Pet. App. 109 (same), Pet. App. 112 (it is "quite possible" that instructions had been interpreted improperly) (citation omitted).

The court apparently came to this quandary by failing to update its reading of *Mills*. *Mills* was decided before *Boyde*, and in *Boyde* this Court specifically noted that the *Mills* opinion offers several improper formulations of the instructional standard: for example, whether jurors "could have" been confused, or whether there was a "substantial possibility" of confusion. *Boyde*, 494 U.S. at 378. But these

standards are no longer correct, and so the Third Circuit was wrong to use them. The underlying issue here, properly framed, is whether the jury instructions, measured by the *Boyde* standard, raised a reasonable probability that the jury would misunderstand the instructions so as to violate *Mills*.

Under AEDPA, of course, there is an additional layer of deference: The question for the federal habeas court is not whether the state court was wrong, but whether its decision was at least reasonable. It surely was. The Pennsylvania Supreme Court first noted that the instructions "mirror[] the language found in the death penalty statute of our Sentencing Code" and observed that it had upheld substantively identical instructions in *Commonwealth v. Hackett*, 627 A.2d 719 (Pa. 1993), *Commonwealth v. Marshall*, 633 A.2d 1100 (Pa. 1993), and *Commonwealth v. O'Shea*, 567 A.2d 1023 (Pa. 1989), *cert. denied*, 498 U.S. 881 (1990). Joint App. 124. The state court had earlier explained, in these cases and others, that this language did not require jury unanimity with respect to the *presence* of mitigating circumstances, but only regarding the *absence* of mitigating circumstances. *Hackett*, 627 A.2d at 725. Thus, even if a single juror believed that a particular mitigating circumstance was present, he or she could weigh mitigation against any aggravating circumstance the prosecution might prove. *Id.*

Rather than make the necessary case – that is, that the state court could not within reason have concluded that even a single juror would have properly understood the instructions – the Third Circuit sought out ostensible shortcomings in the state court's opinion. The Court of Appeals criticized the Pennsylvania Supreme Court, for example, for analyzing the instructions as written, rather

than attempting to divine their pyschodynamic significance for a jury. Pet. App. 109. But there is no requirement that a court must speculate on the cognitive impact of jury instructions beyond their plain meaning; it is enough if the instructions are clear and correct. As the Seventh Circuit said in rejecting a similar dispute about whether jurors were likely to "understand" a certain jury charge: "As there are no perfect trials, so there are no perfect instructions. How best to convey the law to lay persons sitting on juries is in the end a question for state legislatures and trial courts to resolve . . . . The jury is a means to resolve disputes, not a waystation by which the controversy at trial is transported to a higher level of generality as a social science dispute about juries." *Gacy v. Welborn*, 994 F.2d 305, 312 (7th Cir. 1993) (Easterbrook, J.).

Similarly, the Third Circuit suggested that the state court opinion was inadequate because it was insufficiently lengthy. But the state supreme court disposed of the *Mills* claim here on the basis of its earlier precedent rejecting challenges to *identical* instructions, and this application of precedent is exactly what an appellate court is supposed to do. The state court cited some of its previous decisions, Joint App. 124, all of which in turn cite *Commonwealth v. Frey*, 554 A.2d 27 (Pa. 1989), *cert. denied*, 494 U.S. 1038 (1990). In *Frey*, the Pennsylvania Supreme Court first applied *Mills* to the standard instructions in greater depth; the court in *Frey* had concluded that "individual jurors were free to weigh whatever mitigating circumstances they perceived . . . ." 554 A.2d at 31. It cannot be seriously contended that the state court was obligated to restate the analysis of *Frey* in every detail, over and over again, in all the cases that followed.

Nor do any other circumstances in this case support the Third Circuit's declaration that the state court's decision must be unreasonable. The federal court asserted that the verdict slip, on which the jury recorded its decision, somehow increased the possibility of confusion – but the slip's language exactly tracked the oral instructions. Pet. App. 116-118. If anything, the slip *reduced* the possibility of juror confusion. The whole point of the Third Circuit's "sound-bite" analysis, followed by the Court of Appeals in this case, is that, when the jurors *heard* "unanimous" and "mitigating" too "close" together, they might have misunderstood the correct juxtaposition of the words in relation to neighboring language. If the same words are *written down*, however, this is no longer a danger. On the contrary, where written instructions are at issue, the only question is whether the instructions are ambiguous as a matter of grammatical structure or language. But as a matter of grammar and language, the instructions in this case are identical to the instructions in *Zettlemoyer*, which the Third Circuit approved a decade ago. Thus, the existence of written instructions renders the state court decision *more* reasonable, not less.[21]

Finally, the reasonableness of the Pennsylvania Supreme Court's decision is also clear from a review of

[21] In state court, Banks also claimed that the polling of the jury had somehow created the possibility of juror confusion. Joint App. 127. At the end of the trial, Banks requested that the jury be polled; the trial court asked each juror whether he or she agreed with the verdict. In doing so, the court repeated some of the same language used in the instructions and the verdict slip. The Third Circuit agreed with the state court, however, that this jury polling had not made the possibility of juror confusion more likely. Pet. App. 119.

other federal decisions. Many other circuits have rejected *Mills* challenges to similar instructions and verdict sheets. *See, e.g., Smith v. Dixon*, 14 F.3d 956, 982 n.15 (4th Cir.) (*en banc*), *cert. denied*, 513 U.S. 841 (1994) (no *Mills* error where jury required to write "Yes" on the verdict form beside each mitigating circumstance "for which the defendant has satisfied you"); *Lawson v. Dixon*, 3 F.3d 743, 754 (4th Cir. 1993), *cert. denied*, 114 S.Ct. 1208 (1994) (same: court charged that jury must unanimously find that aggravating circumstance or circumstances outweighed "any" mitigating circumstances found); *Maynard v. Dixon*, 943 F.2d 407, 420 (4th Cir. 1991), *cert. denied*, 502 U.S. 1110 (1992) (instruction "impose[d] a unanimity requirement on aggravating circumstances and the other elements of the death sentence deliberations, but not . . . as to the mitigating circumstances"); *Scott v. Mitchell*, 209 F.3d 854, 874 (6th Cir.), *cert. denied*, 531 U.S. 1021 (2000) (no *Mills* issue where jurors told "all 12 of you must sign [the verdict form] . . . [i]t must be unanimous"); *Kordenbrock v. Scroggy*, 919 F.2d 1091, 1120 (6th Cir. 1990) (*en banc*) (nine of thirteen judges on *en banc* panel rejected *Mills* claim because there was no express unanimity requirement as to mitigation, and "it cannot be reasonably inferred that silence as to finding a mitigating factor would likely cause the jury to assume that unanimity was also a requirement"), *cert. denied*, 499 U.S. 970 (1991); *Coe v. Bell*, 161 F.3d 320, 338 (6th Cir. 1998), *cert. denied*, 528 U.S. 842 (1999) (instruction that jury must unanimously find aggravating circumstances are not outweighed by any mitigating circumstances does not violate *Mills*); *Gacy*, 994 F.2d at 306-308 (7th Cir. 1993) (approving instructions that failed to inform jury that single juror who believed mitigating circumstance was present could block death penalty); *Parker v. Norris*, 64 F.3d 1178, 1187 (8th Cir. 1995), *cert. denied*, 516 U.S. 1095 (1996) (that verdict form "failed to inform jurors that they could consider non-unanimous mitigating circumstances" did not violate *Mills*); *Griffin v. Delo*, 33 F.3d 895, 905-906 (8th Cir. 1994), *cert. denied*, 514 U.S. 1119 (1995) (instruction that jury must unanimously find that any mitigating circumstances outweighed aggravating circumstances did not imply that jury must be unanimous in finding a mitigating circumstance); *LaFevers v. Gibson*, 182 F.3d 705, *719 (10th Cir. 1999) ("[a] trial court need not, however, expressly instruct a capital sentencing jury that unanimity is not required before each juror can consider a particular mitigating circumstance").

The Third Circuit entirely ignored these decisions; in fact, the court did not examine *any* decisions outside of Pennsylvania applying *Mills* and *McKoy*. But it is plainly relevant that all of these courts have come to the same conclusion: If an instruction requires unanimity in one step of the sentencing process, that does not mean that the jury is likely to be confused about the other steps. The instructions here pass the *Boyde* test, as the Pennsylvania Supreme Court concluded. This represents – at the very least – a reasonable application of *Mills*.

CONCLUSION

For the reasons set forth above, petitioners respectfully request that this Court reverse the judgment of the United States Court of Appeals for the Third Circuit, and deny the petition for writ of habeas corpus.

Respectfully submitted,

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